

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

8418

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

23,960

UNITED STATES OF AMERICA

vs.

vs.

NORRIS E. WHITE,

APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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STATUTES INVOLVED

22 District of Columbia Code 2901 and 502

Fifth Amendment of the Constitution of the United States

Sixth Amendment of the Constitution of the United States

ISSUES PRESENTED

I. THE INITIAL CONFRONTATION BETWEEN THE APPELLANT AND THE COMPLAINANT WAS CONDUCTED WITHOUT THE PRESENCE OF COUNSEL AND THEREFORE PREJUDICED THE APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

II. THE APPELLANT WAS DENIED HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BY THE ADMISSION OF EVIDENCE CONCERNING THE PRETRIAL IDENTIFICATION AND BY THE SUBSEQUENT DEPENDANT IN-COURT IDENTIFICATION.

III. THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE WAS INADEQUATE AND SO LACKING IN PROBATIVE FORCE THAT IT DOES NOT SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THIS COURT UNDER THE SAME OR ANY SIMILAR TITLE.

THEORY OF THE EARTH

CHAPTER I. OF THE ORIGIN AND GROWTH OF THE EARTH.

THE EARTH, as we see it, is a globe, or sphere, of a very great size. It is composed of a solid mass of matter, which is divided into several parts, or regions, called continents, islands, and seas. The continents are the large tracts of land, which are separated from each other by seas and oceans. The islands are small tracts of land, which are surrounded by water. The seas and oceans are the great bodies of water, which cover the greater part of the surface of the earth. The earth is also divided into several parts, or regions, called climates, or zones. These are the regions which are distinguished by their different degrees of heat and cold. The earth is also divided into several parts, or regions, called ages, or periods. These are the periods of time, which are distinguished by their different characters and events. The earth is also divided into several parts, or regions, called kingdoms, or states. These are the kingdoms and states, which are distinguished by their different laws and customs. The earth is also divided into several parts, or regions, called nations, or peoples. These are the nations and peoples, which are distinguished by their different languages and manners. The earth is also divided into several parts, or regions, called cities, or towns. These are the cities and towns, which are distinguished by their different buildings and inhabitants. The earth is also divided into several parts, or regions, called villages, or hamlets. These are the villages and hamlets, which are distinguished by their different houses and families. The earth is also divided into several parts, or regions, called houses, or families. These are the houses and families, which are distinguished by their different members and interests. The earth is also divided into several parts, or regions, called individuals, or persons. These are the individuals and persons, which are distinguished by their different names and qualities. The earth is also divided into several parts, or regions, called atoms, or particles. These are the atoms and particles, which are distinguished by their different sizes and shapes. The earth is also divided into several parts, or regions, called molecules, or compounds. These are the molecules and compounds, which are distinguished by their different properties and uses. The earth is also divided into several parts, or regions, called elements, or substances. These are the elements and substances, which are distinguished by their different colors and tastes. The earth is also divided into several parts, or regions, called mixtures, or alloys. These are the mixtures and alloys, which are distinguished by their different textures and weights. The earth is also divided into several parts, or regions, called compounds, or mixtures. These are the compounds and mixtures, which are distinguished by their different smells and tastes. The earth is also divided into several parts, or regions, called mixtures, or alloys. These are the mixtures and alloys, which are distinguished by their different textures and weights. The earth is also divided into several parts, or regions, called compounds, or mixtures. These are the compounds and mixtures, which are distinguished by their different smells and tastes.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

23,960

NORRIS E. WHITE,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

The Appellant, Norris E. White, was indicted by Grand Jury Number 151-69 for offenses under 22 District of Columbia Code 2901 and 502 occurring on or about December 21, 1968. Trial was held in the United States District Court for the District of Columbia before the Honorable Judge John Lewis Smith, Jr., on December 4 and 5, 1969. The jury returned a verdict of guilty as charged; and upon this said conviction,

the appellant received an imprisonment for one (1) to seven (7) years on each count, said sentences to run concurrently. The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1291.

REFERENCES TO RULINGS

REFERENCES TO ORAL OR WRITTEN RULINGS IN WHICH THE COURT SET FORTH THE BASIS OF AN ORDER OR JUDGMENT ARE NOT APPLICABLE TO THIS APPEAL.

STATEMENT OF THE CASE

On December 21, 1968 at approximately 4:10 A. M., in the area of Stanton Road and Bruce Place, S. E., Washington, D. C., Phyllis Rhoe was waiting for a bus or cab when she was approached by a Negro male who assaulted her with a pistol and took from her person a purse containing \$50.00 in cash. The appellant, Norris E. White, was arrested several hours later that same morning and was subsequently tried and convicted in the United States District Court for the District of Columbia.

The assault and robbery occurred while Phyllis Rhoe was awaiting transportation to take her to the Greyhound Bus Station so that she could visit her home in North Carolina (TR. 18). As she waited at this bus stop, she observed an

unidentified man enter an apartment building at a distance of about one hundred (100) feet from her (TR.39) on Bruce Place (TR.19). About five or ten minutes later a man, she does not know if the same man, (TR.40) came out of the same apartment building, passed her, then turned and called out "Hey you." (TR.20). She turned, saw this man pull out a "long pistol" from his belt (TR.42) and she began to run (TR.20,52). The assailant caught her in the middle of Stanton Road (TR.38) at which time she threw her black shoulder purse at him (TR.22,42). They struggled for about ten to fifteen minutes (TR.20) with her screaming and fighting (TR.21). She was forced toward an alley and struck on the left side of the head. (TR.21,51). She was then able to break loose of her assailant, and run back to the middle of the street where she flagged down an approaching car (TR.21,51). The assailant then ran through a nearby alley (TR.21). Mrs. Rhoe was then taken to the Eleventh Precinct where a report was made. She described her assailant as a light complected male, dressed in all black clothes, having sort of processed hair with a distinguishing part (TR.23). He had a lot of hair, was about twenty-seven or twenty-eight years of age, about five feet ten inches tall and weighed 149 to 150 pounds.

He was wearing a jacket that came down to his hips, a short coat (TR.24). The part in the hair on the assailant's head was on the left side (TR.29). His hair was processed (TR.30). She also described her assailant to police as being a light skinned male, five feet ten inches to six feet tall, with long processed hair and a distinctive part (TR.106). At the Grand Jury hearing she stated she recognized her assailant by the part on the right side of his head (TR.56).

She was then taken to Cafritz Hospital where she received treatment to her head injury (TR.25). The police officers Yeager and Bradley arrived at the hospital, where they interviewed her, and then took her back to the scene of the robbery (TR.25). After the police investigation of the area and the apartment house was complete, and as the squad car was pulling away from the curb, she stopped them, and indicated that a man who had just walked around the corner was her assailant. As the man passed the police car, she identified him. The police apprehended him as he was knocking on an apartment door across the street and brought him back to the police vehicle where a second identification by Phyllis Rhoe was made while she was still within the police vehicle. He was wearing a hat, his hair was not

processed and his clothing was not as had been described. Although he had money with him, none of the denominations matched those which the Rhoe woman claimed to have lost.

At the time of trial the defendant's wife testified that her husband was with her between the hours of 3:30 to 5:00 A. M., on the day of the alleged incident.

She further testified that a gun was not maintained within the house and that there had never been a gun in the house (TR.0111).

Mr. White was employed as a carpenter's helper at the Fairfax Village where he had worked for approximately ten years. He was due to report for work that morning at 8:00 A. M., and had planned on catching a bus at about 7:30 A. M., so that he would be at his employment on time. Prior to catching the bus he was to have visited his neighbor, upon whose door he was knocking when apprehended.

SUMMARY OF ARGUMENT

Since the 1967 Supreme Court decisions of WADE - GILBERT - STOVALL, infra, significant precedent has developed around the constitutional right to counsel and the denial of due process of law as concerns pretrial confrontations. Initially the rights of the accused were extended from trial to post-indictment confrontations. Subsequently the right to counsel and protection against the denial of due process of law have evolved to include particular instances of pre-indictment confrontations. The determination of when these rights are invoked over the public interest in apprehending the criminal is the basis of present case law.

The case before the Bar involves such an issue. By distinguishing the factual circumstances of the present case from those immediate on-the-scene confrontation cases where these basic constitutional rights are not extended, and by applying the reasoning of the post-indictment confrontation cases where the rights are affirmed, it will be established that the instant case requires the extension of these constitutional rights and the denial of such was harmful error sufficient for reversal of this conviction.

Additionally, the arguments show that the evidence presented at trial was insufficient to support a finding of guilty beyond a reasonable doubt and therefore the conviction must be reversed.

I. THE INITIAL CONFRONTATION BETWEEN THE APPELLANT AND THE COMPLAINANT WAS CONDUCTED WITHOUT THE PRESENCE OF COUNSEL AND THEREFORE PREJUDICED THE APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

Norris E. White's conviction should be reversed. He was stopped on the street at 6:25 A. M., and arrested for a crime that took place at 4:00 A. M., some two and one-half hours earlier. He had no knowledge of the circumstances of the crime, did not meet the physical description of the assailant, and carried no evidence indicating his guilt. He had a logical explanation for his presence in the area yet he was arrested. The arrest was based solely upon the complainant's identification which occurred as the police were leaving the scene and returning her to her home. This last minute allegation against the appellant prompted a face-to-face encounter, conducted by the police, between the appellant, Norris E. White, and his accuser. Such encounter denied the appellant's right to counsel at this identification stage of prosecution. The admission of this identification evidence which was acquired at an uncounselled pretrial confrontation where

such lack of counsel irreparably prejudiced appellant's right to a fair trial; and further, the admission of the in-court identification, which was taken without first determining that it was not tainted by the prior illegal confrontation and was in fact supported by an independent source, constituted prejudicial error sufficient for reversal.

The constitutional right to counsel under the Sixth Amendment has been extended to apply to pretrial confrontations by the June 1967 Supreme Court trilogy decisions of WADE-GILBERT-STOVALL, *infra*. The decision in United States v. Wade, 388 U.S. 218 (1967) was specifically concerned with the right to counsel at post-indictment confrontations for the purpose of identification of a suspect by his accuser and/or a witness, particularly in lineup type identification procedures. The language of the Supreme Court in making the determination that the right to counsel exists at confrontations prior to trial, suggests that it applies additionally to confrontations which occur prior to indictment.

Gilbert v. California, 388 U.S. 263 (1967) supports

the United States v. Wade, supra, decision and highlights the admissibility question of the in-court identification making this determination dependent upon the existence of an independent origin for such identification. "The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error." United States v. Wade, supra. Here, as in Gilbert v. California, supra, the prosecution has not established "that the in-court identification had an independent source, or that their introduction in evidence was in any event harmless error."

Stovall v. Denno, 388 U.S., 293 (1967) recognizes that confrontations of accused persons with identifying witnesses are critical stages of the prosecution and that counsel is required at all such confrontations, but declines to apply the rule enunciated in United States v. Wade, supra, retroactively.

Supplemental opinion on the applicability of this rule to pre-indictment confrontations was expressed in Russell v. United States, 133 U.S. App. D. C. 77 (1969) where it was

determined that the rule does not apply to prompt confrontations with an eyewitness at the scene of the crime. The Court quoted the language of the Wade case which implies that the right to counsel exists at any pretrial confrontation arranged by police, regardless of circumstances:

"The pretrial confrontation for purposes of identification may take the form of a lineup, also known as an 'identification parade' or 'showup', as in the present case, or presentation of the suspect alone to the witness as in Stovall v. Denno.... It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification."

The Court further stated that their decision was based upon the fact that no "substantial countervailing policy" considerations were advanced against the presence of counsel. The Russell opinion concerns immediate on-the-scene confrontations and distinguishes United States v. Wade, supra, by finding substantial countervailing policy considerations to place confrontations occurring moments after the crime outside that rule.

The case now before this court falls in neither specific category; not that of United States v. Wade, supra, nor

that of Russell v. United States, supra. Here the time duration was lengthy, the surrounding circumstances contributed no additional incriminating evidence, and the physical description rendered to the police proved to be substantially incorrect; yet the confrontation was not post-indictment as in United States v. Wade, supra, but rather at the location and several hours after the crime. The distinctions innumerable are sufficient to remove this set of facts from the rule found in Russell v. United States, supra. The policy considerations expounded in that case are not supported by the facts in the instant case. The enhancement of a positive and reliable identification of the suspect by the witness, coupled with the general desire to release innocent suspects as quickly as possible was the substantial countervailing policy by which the denial of the right to counsel at the Russell confrontation was justified. In the case at Bar the reliability of the identification has already been marred by the two and one-half hours which had elapsed since the crime. Thus the emphasis upon immediate identification to promote reliability does not bear the same import here as in

Russell v. United States, supra, where only minutes split the identification from the crime. Therefore it is submitted that the primary footing of the countervailing policy argument against the right to counsel at pretrial confrontations is not applicable to the present case.

Further, the arguments of United States v. Wade, supra, with respect to appearance of counsel at these confrontations as the only means to regulate identification procedures and to know what actually occurred with regard to identification suggestiveness and fairness to the accused bear merit. Without counsel being present at appellant's identification confrontation there is no means available to ascertain how suggestive the identification was nor the positiveness of such identification. When the suspect is subsequently convicted principally upon this identification what defense arguments are open which do not rely entirely upon prosecution witness opinion? What basis must the defense counsel utilize in cross examination relative to the confrontation? In the language of United States v. Wade, supra, this is "a critical stage of the proceedings" where the right to counsel applies. There the

Supreme Court specifically addressed the right to counsel where denial of such would inhibit the accused's ability to conduct his defense:

"With respect to an accused's right to counsel under the Sixth Amendment, the Court must scrutinize any pretrial confrontation of the accused to determine whether his counsel's presence is necessary to preserve his basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself; the Court must analyze whether potential substantial prejudice to the accused's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."

The denial of the right to counsel at this pretrial confrontation limited the appellant's right to a fair trial which specifically contradicts the ruling of United States v Wade, supra. Although this issue arose in the context of formal post-indictment confrontations, the right to counsel is equally applicable to the informal pre-arrest confrontation.

"Indeed, the more informal the confrontation procedure, the greater is the danger of suggestiveness, and the greater the difficulty of ascertaining at trial the facts of the confrontation." Long v. United States, ____ U. S. App. D. C. ____ (No. 22,218, Decided December 18, 1969)

The issue of the right to counsel has been presented to this court in numerous cases, but in each instance the basis for decision of this issue of constitutional rights has hinged upon two factors: immediate confrontation occurring moments after the crime, and additional incriminating evidence. See Mason v. United States, 134 U. S. App. D. C. 280 (1969), United States v. Green, ____ U.S. App. D. C. ____ (No. 22,923, Decided April 29, 1970), Long v. United States, supra. Neither of these distinguishing aspects appear in this case.

In United States v. Greene, supra, the court on appeal reversed the appellant's conviction because his right to counsel had been denied and as in Long v. United States, supra, "the difficulty attendant upon accurately reconstructing the exact circumstances of the pretrial confrontation, and the useful role which counsel can play not only in that process but in suggesting procedures which might render the confrontation legally unassailable thereafter" were deemed significant aspects of the appellant's right to a fair trial.

The appellant in the instant case was not afforded this basic right to a fair trial. He was not informed of the aspects of the investigation which would enable him, even without counsel, to observe the manner and procedure which was suggestive and prejudicial to his defense. Had counsel been present when even an informal confrontation was conducted, the suggestive aspects of the procedure could have been eliminated. Preferably, the identification could have been made at a formal lineup. Further the ability to ascertain the facts of the confrontation would have permitted an intelligent decision as to the suggestiveness and prejudice of the confrontation to the appellant at trial; an impossible task under the present circumstances. The policy considerations supporting the confrontation without counsel are insignificant as applicable to these case facts. The degree of reliability of the single suspect confrontation, when conducted after several hours have elapsed, has diminished to such an extent that a lineup identification offers a better test. The image of the assailant would fade little more than it has in the intervening two and one-half hours. Additionally,

the argument that the detention of an innocent suspect is against best public interest, does not compare to the harm rendered the innocent suspect when convicted on an issue for which public policy has removed his only defense.

II. THE APPELLANT WAS DENIED HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BY THE ADMISSION OF EVIDENCE CONCERNING THE PRETRIAL IDENTIFICATION AND BY THE SUBSEQUENT ~~DEFENDANT~~ IN-COURT IDENTIFICATION.

Appellant's conviction should be reversed because it stands entirely upon a positive court room identification which was the direct result of a pretrial identification confrontation conducted in violation of due process under the Fifth Amendment. The admission of this pretrial identification evidence was a constitutional error of the first magnitude which prejudiced the appellant at trial. This evidence so tainted the court room identification as to render it prejudicial error sufficient to reverse the appellant's conviction.

The complainant witness recognized appellant as her assailant while she was being transported in a moving

police squad car. Following such recognition the officers stopped their car, approached appellant, and returned him to the vehicle for a face to face confrontation with the victim for the purposes of obtaining identification evidence. It may be ascertained from the officer's trial testimony that this confrontation occurred at approximately 6:25 A. M., some two and one-half hours after the crime was committed. Further the investigation by police failed to indicate any evidence at all which would warrant suspicion of the appellant as having been involved in the crime. The physical description given by the victim did not fit, the appellant showed no signs of a struggle, and neither the gun, nor money, nor pocket-book could be found. Yet the investigating officers denied the appellant the single defense he might have developed; the chance to require his accused to positively identify him when presented in an organized show up of persons bearing similar physical features. The face-to-face confrontation precluded such a show up, and therefore denied appellant the chance to test the victim's identification.

The circumstances surrounding the pretrial identification fail to fulfill the requirements necessary to justify such a confrontation. The face-to-face confrontation is permitted where it immediately follows the crime, occurs near the scene, and there is a totality of evidence to warrant such confrontation. Russell v. United States, supra.

In Wise v. United States, 127 U. S. App. D. C. 279 (1967) such a confrontation was allowed, but in that case a husband and wife returned home to find a thief within their home. The husband chased the thief and apprehended him without having ever lost sight of him. The identification by the wife and husband occurred minutes after the crime and was conducted by police officers summoned by the wife to assist her husband. In the case before this court there was no suspicion of the appellant other than a quick glance recognition and the identification was more than two hours after the crime.

In United States v. Wade, supra, the Supreme Court ruled upon pretrial identification confrontations and although concerned with lineup formulation and the right

to counsel, expressed concern over the usage of pretrial confrontation. The Court observed:

"But the confrontation compelled by the State between the accused and the victim or witness to a crime to elicit identification evidence is particularly riddled with innumerable dangers and variable factors which might seriously, even crucially, degrade from a fair trial. The vagaries of eyewitnesses are well-known; the annals of criminal law are rife with instances of mistaken identification."

The Court further states that once a witness or victim picks out the accused he is not likely to go back on his word, and therefore, the identification is determined then and there. The additional problem of increased impediments to an objective observation is recognized where the victim is the witness. The Supreme Court further states that rape and robbery prosecutions present a particular hazard because the victim's outrage may excite vengeful or spiteful motives. This is precisely the stature of the appellant's case where he has been identified by the victim of a robbery and attempted rape and was not afforded the protection of a show-up which would buffer the victim's emotions and ensure a positive identification. Stovall v. Denno, supra, ruled that

particularized due process determinations must be made regarding confrontations.

The case of Russell v. United States, supra ruled upon the application of the Wade-Stovall principle of pretrial identification confrontations to the prompt confrontation with an eyewitness at the scene of the crime, and determined that such confrontation was not within the Wade case language. The reasoning employed by the court acknowledged that confrontations in which a single suspect is viewed in the custody of the police are highly suggestive, that unconscious or overt pressure may be exerted upon the witness to cooperate with the police, and that the viewer may have been emotionally unsettled by the experience of the fresh offense; but nevertheless overriding these considerations with the "substantial countervailing policy" considerations the Court affirmed the conviction. The question of whether the confrontation in Russell v. United States, supra, was so unnecessarily suggestive and conducive to the irreparable mistaken identification that the appellant was denied due process was determined by review of the facts, "the totality

of the circumstances". "The facts relating to the only reason for doubt were exhaustively explored before the jury". At this juncture the Russell case is distinguished from the case at Bar. There the witness was not the victim but was stationed across the street from the scene of the robbery. After witnessing the robbery he reported to a nearby police station and a responding squad car promptly encountered the appellant in the vicinity. He matched the witness's description, fled from the patrol car, and was apprehended with the stolen merchandise. In addition he had a coat hanger and screwdriver in his pocket, and was wearing black gloves on the particular warm summer night. The confrontation occurred minutes after the crime and therefore complies with the general rule allowing police to immediately return a suspect to the scene for identification by one who has seen the culprit minutes before. Russell v. United States, supra.

In the case before the Court the appellant was not apprehended and presented to the witness within minutes of the crime but more than two hours later. In addition, the incriminating facts are not present to contribute to the

totality of circumstances upon which the question of due process must be decided. The conviction of the appellant allows anyone to accuse and convict another of a crime without showing additional incriminating evidence or putting the identification of said suspect to the test of a line-up. What defense remains for the accused?

Following the Russell decision additional confrontation issues have been brought before the United States Court of Appeals for the District of Columbia Circuit.

In Stewart v. United States, ____ U. S. App. D. C. ____ (No. 20983, Decided February 10, 1969) this Court interpreted Clemons v. United States, No. 19,846 (D. C. Cir., December 6, 1968) and stated that where the admissibility of complainant's testimony as to the confrontation and the admission of his in-court identification are questioned, constitutional requirements are met by showing the confrontation was not so unduly suggestive as to amount to a violation of due process or that the record provides an independent source for the identification such "that we can justifiably regard that identification was not fatally tainted by the illegal exposure". In that case the police were in pursuit of

the suspect, who dropped the stolen items when chased. The court justified the confrontation because it occurred only minutes after the victim saw the man with the stolen items and promoted fairness to the accused by allowing this viewing by the victim while his mental image of the man they pursued was fresh. In addition the police had information from the accused accomplice which further provided an independent source of identification. In contrast the appellant before this Court was not seen as a criminal by the victim minutes before the confrontation, was not suspect on additional grounds, was not identified by an independent source, and did not flee from the police and his accuser.

In Macklin v. United States, 133 U. S. App. D. C. 139 (1969) the defendant was accused of joining with an accomplice in the holdup of a liquor store delivery man. The robbery was reported within minutes, and immediately two men were arrested as they left a playground area where bottles bearing the liquor store stamp were discovered. Additionally, the two men met the description offered by the victim on his initial report. The victim identified the suspects at the playground and again at a preliminary

hearing. Thus the defendant was arrested by police and confronted with his accuser only moments after the crime and such confrontation was supported by a matching physical description, suspicious behavior of the defendant and further evidence found on the playground (hidden liquor). This Court in Macklin v. United States, supra, looked to the totality of the circumstances surrounding the identification to ascertain the legality of such confrontation. The identification was not unnecessarily suggestive when taking into consideration the short time between the crime and the confrontation, the occurrence of the identification in the vicinity of the crime, the fact that witness could not identify the second robber (indicating a lack of vengeful motives), and additional evidence known to the police at the time of the confrontation. Even with this set of circumstances, the trial court had excluded reference to this pretrial identification to preclude tainting the in-court identification. The totality of the circumstances in the instant case does not illicit this response of suspicion of the appellant, and, in comparison, warrants the conclusion

that the pretrial confrontation was so suggestive as to violate due process of law. Where a confrontation is unduly suggestive the burden shifts to the Government to show by clear and convincing evidence that a later in-court identification had an independent source. United States v. Wade, supra.

III. THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE WAS INADEQUATE AND SO LACKING IN PROBATIVE FORCE THAT IT DOES NOT SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

The appellant's motion for judgment of acquittal based upon the insufficiency of the prosecutions evidence should have been granted. If there is no evidence upon which a reasonable mind may fairly conclude guilt beyond a reasonable doubt, the motion must be granted. Curley v. United States, 81 U. S. App. D. C. 389, 160 F.2d 229 (1947), certiorari denied, 331 U. S. 837.

It seems clear that upon the evidence of the instant case the reasonable mind would have had great doubt as to the guilt of the appellant.

The identification of the appellant was the basis for his conviction at trial. This identification evidence

was inadequate to sustain the conviction. The complainant, after being attacked by an unknown assailant, was placed in a position where she held the key to finding the guilty person and thereby fixing the blame on someone for her humiliation and loss of property. After the police had given up their search and were pulling away from the curb to take the complainant, Phyllis Rhoe, home she identified a lone man turning the corner as her assailant. His description did not match that which she had given to the police. The distinctive processed hair that was the basis of her earlier description was not visible in that the man had on a hat. When the hat was removed and the hair was not processed, then the description changed, and Norris White, a family man with ten years of steady employment in the same firm, and no prior record, was apprehended and later convicted. All this, even though the identification lacked credibility, the police investigation failed to uncover any evidence to support this identification such as the gun, the stolen money (although appellant had money on his person in that he had just been paid), and the appellant showed no signs of any struggle and did not attempt to flee from the police

when called. All of the above factors, which were before the court and the jury, raise serious doubts as to the guilt of the appellant.

"Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence." Cooper v. United States, 94 U. S. App. D. C. 343 (1954).

It becomes obvious that the complainant having had the opportunity to view Norris White at the scene of the occurrence without his hat then and there formed an impression of the "guilty man". Not only was there reasonable doubt as to the guilt of the appellant, but the conclusion reached by Phyllis Rhoe was that of an emotionally upset woman who had sustained a head injury and was about to be taken to her home without an opportunity to prove her story of being robbed and assaulted. Was it that she believed that the man who came around the corner was her assailant or was this her last chance to prove her story, and Norris White was the unlucky man, in the wrong place at the wrong time? Not

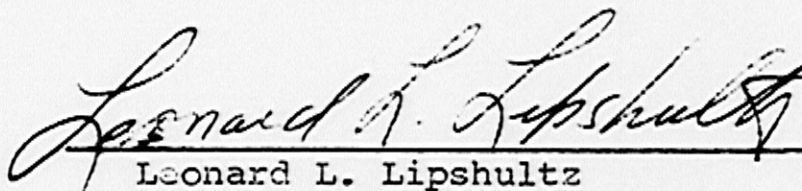
only was there great doubt as to the identification, but also great doubt as to the ability of an emotional woman with a recent head injury to recall an accurate description. In view of this more than reasonable doubt the Court should have granted the motion made by defense counsel for judgment of acquittal. A conviction based upon jury findings may be overruled on appeal if the result is not supported by the evidence. Small v. State, supra. Therefore, in view of the lack of evidence connecting the appellant with the crime, and the emotional and physical limitations under which the complainant saw her assailant and later identified the appellant, the conviction should be reversed based upon the insufficiency of the evidence to support the jury verdict.

CONCLUSION

It is respectfully submitted that upon the above cited decisions, and the application of the legal doctrines, as stated therein, to the facts of this case, it is amply demonstrated that the conviction of Norris E. White, appellant before this Court, was error

and therefore this Court should reverse the lower Court and the conviction of appellant.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief was served upon John A. Terry, United States Attorney, by leaving a copy of same at his office, United States Court House, 3rd and Constitution Ave., N. W., Washington, D.C., this _____.

